(3)

No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY,
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY,
BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
AND CSX TRANSPORTATION, INC.,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES, *et al.*,
Respondents.

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF BURLINGTON NORTHERN RAILROAD COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petitioners and *Amicus Curiae*, the National Railway Labor Conference, urge this Court to grant the Petition for a Writ of Certiorari. Respondents have escalated a local dispute, which directly concerns only 110 employ-

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* Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

ees and a small railroad in a remote part of the country, into a conflict which threatens to disrupt the national system of rail transportation. The escalation has been accomplished by means of picketing against railroads who are strangers to the underlying dispute and are powerless to hasten its end.[1]

The Conference respectfully submits that the escalation of the primary labor dispute has given rise to numerous lawsuits that, in turn, have created uncertainty about the legal limits of economic self-help in a railway labor dispute and the injunctive power of the federal judiciary to vindicate the objectives of the Railway Labor Act and related legislation. The uncertainty is manifested by a split among the federal courts of appeals, which cannot agree upon the intention of Congress regarding secondary boycotts under the Railway Labor Act. The need for a definitive interpretation of the Railway Labor Act and its relationship to the Norris-La Guardia Act are issues of first importance to rail carriers, the labor organizations that represent their employees, and the public that depends on rail transportation. Until the questions presented by this case are answered, the railroad and airline industries will function in a state of uncertainty that will disrupt ongoing collective bargaining and imperil labor relations stability.

INTEREST OF AMICUS CURIAE

Virtually all of the nation's Class I railroads are members of the National Railway Labor Conference ("NRLC" or "Conference"). The Conference is the multiemployer

[1] The Court has often addressed the "primary-secondary" distinction under Taft-Hartley. *International Union of Elec. Wkrs. v. NLRB (General Elec.)*, 366 U.S. 667 (1961). In its simplest form, the secondary boycott is characterized by economic "sanctions [which] bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *Id.* at 672 (*citing, International Bhd. of Elec. Wkrs. v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950)).

representative of its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for labor relations information and advises and assists its member railroads about the system established by the Railway Labor Act to adjust disputes arising out of workplace grievances or the interpretation of collective bargaining agreements.

The Conference requests that the Court grant the instant Petition and respectfully submits that its statement in support is desirable because it will more fully apprise the Court of the nationwide impact of the issue before it. The Conference's participation will also more fully inform the Court of the danger posed by Respondent's picketing to the national transportation system and the economy which depends upon it for survival.

BACKGROUND

The Brotherhood of Maintenance of Way Employees ("BMWE") represents approximately 110 active railroad workers employed by Maine Central Railroad ("MEC") and the Portland Terminal Co. ("PT"), small local rail carriers located in Maine. The BMWE contract with MEC/PT reopened in 1984, and the parties began negotiations aimed at a new contract on rates of pay, rules and working conditions. By March 3, 1986, the parties had exhausted the major dispute resolution procedures of the Railway Labor Act. The BMWE commenced a lawful strike against the carrier, and later, its corporate affiliates, the Boston & Maine and the Delaware & Hudson. The union was unable to force MEC to capitulate through its use of a primary strike. In the spring of 1986, the BMWE attempted to ratchet up the pressure by picketing third-party, neutral employers in an admittedly secondary campaign of economic warfare. The eco-

nomic pressure exerted upon neutral employers as far away as California, would disrupt the flow of commerce throughout the nation and, as a by-product, economically asphyxiate the BMWE's diminutive opponent. The union apprised the Conference of its plans in a letter of April 8, 1986, in which its President expressed the intention of shutting down "the national rail system."

On May 15, 1986, BMWE commenced picketing at the facilities of the Consolidated Rail Corporation ("Conrail"), and caused substantial disruption to Conrail's operations. Confronted with the threatened shutdown of Conrail as well as other rail carriers, the President of the United States adopted the recommendation of the National Mediation Board and issued an Order appointing an Emergency Board in accordance with the discretion conferred upon him by § 10 of the Railway Labor Act. The Board's mandate was to assist the parties in resolving their dispute. *See* Executive Order No. 12557, appended hereto as Attachment 1. The Railway Labor Act required both parties to maintain the status quo by refraining from all further self-help until July 21, 1986.[2] At that time the parties were free, if so inclined, to resume their posture "at each others' throats," [3] or, in the case of the BMWE, at the throat of any other railroad it sees fit to entangle in its struggle. To date the combat has not resumed, nor has the dispute been settled.

Prior to the establishment of the Emergency Board, Petitioners had successfully urged the United States District Court for the Northern District of Illinois to issue

[2] The President appointed the members of the Emergency Board on May 23. The Board issued its recommendations to the President on June 21, initiating another 30-day cooling off period in which all self-help or other displacement of the status quo is forbidden. *See* 45 U.S.C. § 160; Exec. Order No. 12557, 51 Fed. Reg. 18,429 (1986), Attachment 1.

[3] *Burlington N. R.R. Co. v. BMWE*, No. 86-166, Pet'n at 4a (7th Cir. June 4, 1986).

a preliminary injunction forbidding BMWE from picketing them as neutral parties unconnected with the dispute. On June 4, 1986, however, the Seventh Circuit reversed the district court, vacating the injunction. *Burlington N. R.R. Co. v. Brotherhood of Maint. of W. Employes*, No. 86-166, slip op. (7th Cir. June 4, 1986). Although the BMWE has not yet resumed its secondary boycott activity, the Court of Appeals' decision to vacate the injunction removes the only legal obstacle to its use. The Conference respectfully requests this Court to grant the petition for certiorari and to resolve the troublesome uncertainty surrounding the relationship of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and the Railway Labor Act in the context of secondary picketing, and the meaning to be imputed to the absence of any express provision in the Railway Labor Act addressing secondary picketing.

THE DECISION OF THE COURT OF APPEALS WILL DESTABILIZE LABOR RELATIONS IN THE RAILROAD INDUSTRY.

The important national goal of stable labor relations in the railroad industry is accomplished through a complex collective bargaining procedure established by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* The RLA provides for resolution of disputes over the establishment or modification of rates of pay, rules and working conditions ("major disputes") by requiring the employer and the labor organization representing a craft or class of its employees to provide notice of the intended change, negotiate over it, take part in government-controlled mediation if it is requested of or proffered by the National Mediation Board ("NMB") and, finally, to participate in a Presidential Emergency Board investigation if the dispute threatens to deprive a region of the country of essential transportation servcice. All of these procedures must be exhausted before either the rail carrier or the labor organization can use economic self-help to force

acceptance of its demands. *See Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969).

During the sixty years that have followed passage of the Railway Labor Act, labor and management have evolved their own procedures within the parameters of the statute to deal with the major disputes that occur in the industry. *Elgin, J & E. R. v. Burley*, 325 U.S. 711, 752-753 (Frankfurter, J. dissenting) (1945), *accord*, *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750-60 (1961) (analogizing to the NLRA). The number of these disputes is considerable. The NMB has reported that as of 1982, there were approximately 7200 individual railroad industry labor agreements on file with the Board, and the number is growing. There were 1000 more in 1982 than in 1975. 48 NATIONAL MEDIATION BOARD ANN. REP., 64 (1982). These written agreements represent only the fraction of major disputes that are resolved by written agreements submitted to the NMB pursuant to Section 5(e) of the RLA. *See* 45 U.S.C. § 155(e).

Some issues are negotiated on a multiemployer basis. These national negotiations are traditionally conducted by the National Railway Labor Conference on behalf of most of the major railroads in the United States. In these negotiations, which take place with individual unions or groups of aligned unions, the parties set wage rates and other basic rules and working conditions. *See Brotherhood of R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968); *Chicago B. & Q. R.R. v. Railway Employee Department*, 301 F. Supp. 603 (D.D.C. 1969). Other elements of the employment relationship are negotiated on an individual carrier basis. In turn, some of these subjects are negotiated on a carrier or system-wide basis and others are resolved by an agreement that is applicable to a work site or local area. At any point in time, there are hundreds of pending major disputes in the railroad industry at various stages in the collective bargaining process.

This tradition of continual collective bargaining in the railroad industry[4] exists in delicate harmony with the first-stated purpose of the RLA: "To avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. This method of bargaining has evolved and endured because the parties have predictable expectations about the bargaining procedure and the economic self-help that is permissible if the procedure does not result in an agreement.

The decision of the Court of Appeals in the *Burlington Northern* litigation has unsettled the expectations that undergird the collective bargaining process. The uncertainty it has created about the lawful bounds of self-help transcend the dispute between the Maine Central Railroad and the Brotherhood of Maintenance of Way Employes. It can change the dynamics of collective bargaining in the railroad industry.

Prior to the *Burlington Northern* and related decisions,[5] a rail carrier engaged in a major dispute with a labor organization representing its employees understood the implications of exhausting the collective bargaining process without reaching an agreement. The employees in the affected craft or class could strike and set up picket lines. Other carrier employees might honor the picket-line and refuse to report for work. The employees of other employers having business at the picketed facility might also refuse to cross the picket-line. For the most part, the bounds of lawful self-help were coterminous with the rail facilities of the primary employer.[6]

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[4] *See Elgin, J. & E. R. v. Burley*, 325 U.S. at 752-53 (Frankfurter, J., dissenting).

[5] *Burlington N. R.R. v. BMWE*, No. 86-166, slip op. (7th Cir., June 4, 1986); *Richmond, F. & P. R.R. v. BMWE*, No. 86-3544, slip op. (4th Cir., July 12, 1986); *Central Vermont Ry. v. BMWE*, No. 86-5245, slip op. (D.C. Cir., June 27, 1986); *Consolidated Rail Corp. v. BMWE*, No. 86-7283, slip op. (2d Cir., June 5, 1986).

[6] In the Florida East Coast strike in 1966 and in the BRAC-Norfolk and Western strike in 1978, extension of picket-lines to

Now, under the decision of the Court of Appeals, the picketing can be extended to the facilities of other railroads having nothing to do with the major dispute, or to the premises of the carrier's shippers, suppliers, and consignees. The decision of the Court of Appeals effects a fundamental modification in the "arsenal of weapons" available to a labor organization in a major dispute. The capacity of a union in a dispute with a small carrier to threaten the entire national rail system through the use of secondary picketing will necessarily alter the dynamics of bargaining in the hundreds of major disputes that are currently pending throughout the industry.[7] The questions presented in Burlington Northern's Petition are of paramount national importance and should be resolved by this Court.

In addition to presenting a question of compelling importance, the decision of the Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Court of Appeals for the Eighth Circuit in *Ashley, D. &*

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other railroads occurred either because the railroads shared common facilities or because the "secondary" railroads were rendering special strike-related assistance to the primary carrier. *See Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d at 225; *Alton S. Ry. v. Brotherhood of Ry. and Airline Clerks*, 481 F. Supp. 130 (D.D.C. 1978).

[7] The RLA is applicable to airlines as well as railroads. The Court of Appeals' opinion necessarily enhances the prospect of secondary picketing in major disputes in both industries. The prospect for such picketing, and the disruptive effect of even its threat, was illustrated by the recent statement of the International Association of Machinists ("IAM") to the U.S. Department of Transportation in the Texas Air-Eastern Acquisition Case, Docket No. 43825. The IAM argued that labor protective conditions should be imposed as a condition to the merger in order to prevent a nationwide disruption to air service that could result from a labor dispute incident to the merger. Because of the *Burlington Northern* and related court decisions, "the possibility of a nationwide disruption of the air transportation as a result of this merger is therefore greatly increased." *Id.* at 14.

N. Ry. v. United Transportation Union, 625 F.2d 1357 (8th Cir. 1980), and United States Court of Appeals for the Fifth Circuit in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided court*, 385 U.S. 20 (1966). In both cases the courts held that there were limits to the right to picket incident to self-help in a major dispute and that the limits were enforceable by a court injunction.

The Court of Appeals below interpreted the Railway Labor Act to permit unrestrained self-help once the collective bargaining procedures are unsuccessfully exhausted. This has never been the view of this Court and it is at odds with the policies of the RLA. When the Court restricted the carrier's self-help in *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966), it "honored" the "spirit of the Railway Labor Act" by prohibiting the carrier from using a strike as an occasion to make sweeping changes in the work rules of its employees. *Id.* at 247. The Court held that a strike does not destroy the community of the striking employees and the carrier, "as the strike represents only an interruption in the continuity of the relations." *Id.* at 246-47 (footnote omitted). The appropriateness of specific forms of self-help have to be evaluated against this transcending relationship. *Id.* at 247. The Court of Appeals below erred when it failed to take account of the impact of unlimited *union* self-help on the ongoing relationship of the parties to the major dispute, as well as on the labor relationships of other neutral carriers who become the targets of secondary boycotts and picketing.

The *Petition for a Writ of Certiorari* analyzes the Court of Appeals' misapplication of this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). *Amicus Curiae* agrees with that analysis and would emphasize that the court below misunderstood the design of the Railway Labor Act and, in particular, the relationship between

collective bargaining and self-help. "Economic warfare" under the Act is not Armageddon. It is only a means of securing agreement on one or more discrete issues in the overall employer-employee relationship. The Court of Appeals' decision, if allowed to stand, will disrupt labor relations in the railroad and airline industries by permitting a work stoppage on one carrier to infect the labor relations of employers and employees unrelated to the primary dispute.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Railway Labor Conference urges that the instant petition be *granted*.

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ATTACHMENT No. 1

Federal Register Vol. 51, No. 97

Tuesday, May 20, 1986

PRESIDENTIAL DOCUMENTS

Title 3—

Executive Order 12557 of May 16, 1986

The President

Establishing an Emergency Board To Investigate Disputes Between the Maine Central Railroad Company/ Portland Terminal Company and Certain of Their Employees Represented by the Brotherhood of Maintenance of Way Employees

Disputes exist between the Maine Central Railroad Company/Portland Terminal Company and certain of their employees represented by the Brotherhood of Maintenance of Way Employees.

These disputes have not heretofore been adjusted under the provisions of the Railway Labor Act, as amended [the "Act"].

These disputes, in the judgment of the National Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services.

NOW, THEREFORE, by the authority vested in me by Section 10 of the Act (45 U.S.C. § 160), it is hereby ordered as follows:

Section 1. *Establishment of Board.* There is hereby established, effective May 16, 1986, a board of three members to be appointed by the President to investigate these disputes. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or

any carrier. The board shall perform its functions subject to the availability of funds.

Sec. 2. *Report.* The board shall report its findings to the President with respect to these disputes within 30 days from the date of its creation.

Sec. 3. *Maintaining Conditions.* As provided by Section 10 of the Act, from the date of the creation of the board and for 30 days after the board has made its report to the President, no change, except by agreement of the parties, shall be made by the carriers or the employees in the conditions out of which these disputes arose.

Sec. 4. *Expiration.* The board shall terminate upon the submission of the report provided for in Section 2 of this Order.

THE WHITE HOUSE,
May 16, 1986.

/s/ Ronald Reagan

Editorial note: For the White House announcement of May 16 on the establishment of the emergency board, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 20).